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No. 81-1891

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE and BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

DENNIS LINDSAY*
ROBERT E. BABCOCK
LINDSAY, HART, NEIL & WEIGLER
111 S.W. Columbia, Suite 700
Portland, Oregon 97201
(503) 226-1191
COUNSEL FOR AMICI CURIAE

*Counsel of Record

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MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE

Pursuant to Rule 36, United States Supreme Court Rules, the Alliance of American Insurers and the National Association of Independent Insurers seek leave to file a brief supporting the Petition and demonstrating that contributions to pension/health and welfare funds are not

"wages" within the meaning of Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(13). Consent of counsel for Petitioners has been received. Consent of Respondent Hilyer has been refused. The position of the Department of Labor is not clear.

Despite its designation as "Respondent," the Department has reversed its former position and now agrees that the decision below was wrong.[1] The Department's consent has been neither refused nor granted.

Movant Alliance of American Insurers is a trade association of 150

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[1] See, Supplemental Brief for the Director, Office of Workers' Compensation Programs, filed on April 29, 1982, in Duncanson-Harrelson Co. v. Director, OWCP, Ninth Circuit No. 79-7093. The Department's rationale appears as Appendix A to movants' brief.

property and casualty insurance companies incorporated under the Illinois Not-For-Profit Corporation Act. Movant National Association of Independent Insurers is a trade association of over 500 property and casualty insurance companies. Movants' member companies range from the very large to the relatively small and are engaged in the workers' compensation insurance business in all fifty states and the District of Columbia. According to most recent figures, movants' member companies underwrite approximately 45% of this nation's workers' compensation risks and provide about 36% of the compensation insurance required by employers subject to the District of Columbia Workmen's Compensation Act, 36 D.C. Code, §§ 501 et seq.

Movants offer a perspective on the issues not shared by any party. Movants' members participated in and supported

the 1972 reforms to the LHWCA benefit structure. Movants can show that the Court of Appeals' interpretation of Section 2(13) is unlike any definition used in that legislative process or at any time during the LHWCA's 55-year history.

Movants' members work with the LHWCA's provisions and administrators on a daily basis. Movants can show that the Court of Appeals' expansive definition of "wages" will provide most workers with a disability income exceeding the pay taken home from productive employment and will vastly increase the incidence of exaggeration and malingering. Movants can show that the decision below will force the reopening of hundreds of thousands of cases "closed" by Deputy Commissioners since 1972 and cause the collapse of the LHWCA's administrative framework.

The accompanying brief focuses upon two elements--the history of the 1972 Amendments and the content of the Comptroller General's April 1, 1982 Report on the LHWCA--not discussed by Petitioners. In addition, the brief discusses two major developments--the reversals of former positions by the Department of Labor and the Benefits Review Board[2]--which occurred after the Petition was filed and which both reflect and aggravate the confusion created by the decision below.

Movants' discussion of these elements and the impact of the decision on the costs and administration of thousands of claims will assist this Court in evaluating the merits of the Petition and assessing the need for immediate reversal.

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[2] See pages 19-20 of Movants' Brief.

This Motion for Leave to File the accompanying Brief should be granted.

DATED: May 12, 1982.

DENNIS LINDSAY
ROBERT E. BABCOCK
LINDSAY, HART, NEIL & WEIGLER
Suite 700, Columbia Square
111 S.W. Columbia
Portland, Oregon 97201
(503) 226-1191

Counsel for Movants

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On Petition For Writ Of Certiorari To The
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BRIEF OF AMICI CURIAE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

SUMMARY OF ARGUMENT

The Court of Appeals overlooked significant legislative history in reaching the conclusion that Mr. Hilyer's "wages" properly included the amounts

which Morrison-Knudsen contributed to the various union trust funds. The decision raises compensation benefits to a level exceeding "take home" pay and removes all economic incentive to resume work from most cases. The decision will require the recalculation of benefits payable in hundreds of thousands of claims long thought "closed" by the individual claimants, employers, and insurers.

Whether measured against traditional concepts of workers' compensation, the bases of the LHWCA's benefit structure, or the definition of "wages" used by all parties to 1972 amendments, the decision is wrong. Unless reversed by this Court, the decision will stress an already shaky system beyond its breaking point.

ARGUMENT

I.

THE DECISION BELOW DISREGARDS THE INTENT AND HISTORY OF THE 1972 AMENDMENT PROCESS AND UNDERMINES A BENEFIT REFORM BUILT UPON THE BASIC PREMISE THAT "WAGES" DO NOT INCLUDE CONTRIBUTIONS TO PENSION/HEALTH AND WELFARE FUNDS

Hundreds of millions of dollars have been paid to hundreds of thousands of workers since the LHWCA's benefit structure was reformed in 1972. These monies were paid on the basic premise--shared by all throughout the LHWCA's history--that the "wages" on which the proper rate of compensation depends do not include employer contributions to pension/health and welfare funds.

Although the effort to give precision to general language gains little from a review of the statutory definition's legislative background, there is convincing

evidence that the decision below is contrary to the meaning intended by Congress.[1] The Act's benefit structure received a great deal of congressional attention in 1972. The history of that year's amendments offers strong proof that the parties to the process were aware of the distinction between included "wages" and excluded "fringes." The parties based their debate about appropriate benefit levels and their ultimate agreement on the definitional premise that "wages" do not include contributions to pension/health and welfare funds.

This Court has already identified the three groups whose interests Congress sought to accomodate in 1972.

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[1] The Act's definition of "wages" has remained unchanged since adopted from its New York model in 1927.

The Department of Labor has prepared

> "The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the Amendments was not with the scope of coverage but with accomodating the desires of three interested groups: (1) shipowners who were discontent with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties."
>
> (Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, at 261 (1977))

Vessel owners played little role in the process of revising the Act's bene-

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1 (continued)

an excellent summary of the pertinent history. See Appendix A.

fit structure. That dispute was between workers and employers and was limited to finding a mutually acceptable ceiling to an increase for which all acknowledged substantial need.

The key "employer" and "worker" roles in the process of agreeing upon the reformed benefit structure were played by a representative of the shipbuilding industry--Mr. Ralph Hartman[2]--and the spokesman for the AFL-CIO--Mr. Howard McGuigan.

Mr. Hartman and Mr. McGuigan spoke a common language when they discussed reformation of the benefit structure with Congress. Both thought that benefits should be increased to a level

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[2] Mr. Hartman later served as a member of the Benefits Review Board and wrote the opinion reversed by the decision below. Mr. Hartman now serves as Director, Office of Workers' Compensation Programs.

more adequately reflecting "wage" loss. Both defined their terms in testimony closely predating the Amendments themselves. Both distinguished between "wages" and "fringe benefits" and shared the premise that "wages" do not include the cost or value of employer contributions to pension/health and welfare funds.

Mr. McGuigan illustrated his complaint that the then-current $70 weekly maximum was inadequate when compared to prevailing "wage" levels with several tables reporting wages and earnings in the longshoring and shipbuilding industries and within the District of Columbia. Those tables specifically excluded contributions to pension/health and welfare plans from the "wage" base.[3]

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[3] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong.,

Mr. Hartman's testimony and his exclusion of those same contributions from "wages" was equally explicit.

> ". . . Currently, the reported average weekly wage in the shipbuilding and ship repair industry approximates $165, which rate covers straight time, overtime, shift work differentials, vacation and holiday allowances.
>
> * * *
>
> It must be recognized, of course, that there are additional weekly employer costs approximating $25 per week covering other contract-related benefits such as non-industrial health and accident insurance, pensions, and statutory costs such as Social Security and state and federal unemployment compensation. These costs continue during disability."
>
> (Senate Hearings, pp. 182-183, emphasis added)

The history is clear. Employer contributions to pension/health and wel-

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2 (continued)

2nd Sess., U.S. Government Printing Office, 1972, pp. 99-110.

fare funds were not considered "wages" at the time the Act's benefit structure was overhauled.[4] The Court of Appeals overlooked this important legislative history and, as a result, adopted a definition which violated a basic premise of the benefit reforms enacted by Congress in 1972.

II

THE DECISION BELOW PERMITS MOST WORKERS TO "NET" MORE OFF WORK THAN ON AND ELIMINATES ANY ECONOMIC INCENTIVE TO RESUME PRODUCTIVE EMPLOYMENT

The Act's current condition was assessed by the Comptroller General in a

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[4] The premise that pension/health and welfare contributions are properly excluded from "wages" is shared by the insurance industry and reflected in its pricing practices. Premiums for workers' compensation and employers' liability insurance are based upon "payroll".

The National Council on Compensation Insurance--the primary workers' compensation rate-making authority--specifically

report issued April 1, 1982, pertinent portions of which appear as Appendix B. The Report focuses substantial attention on the current benefit structure and the problems that result when benefits available for disability begin to exceed "take-home" pay.[5]

Benefit levels which approach or equal full take-home pay replacement minimize return-to-work incentives and delay the return to productive employment. Benefit levels which exceed take-home pay encourage exaggeration and malingering.

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4 (Cont'd)

excludes pension/health and welfare contributions from the proper "payroll" base.

5 "Take-home" pay equals gross pay minus federal and state income taxes, social security (FICA) taxes, and estimated deductions for union dues. Other job-related expenses such as transportation, child care, etc., are not deducted despite the fact that they end or decline during periods of unemployment.

The Comptroller General demonstrated that most workers now receive benefits averaging about 88% of pre-injury take-home pay.[6] The decision below involved contributions of 68 cents per hour, about 15% of Mr. Hilyer's apparent hourly wage. The cost of the parallel items required by the contracts governing longshore labor now exceeds $4 per hour, more than one-third of the "straight-time" hourly wage.[7] The impact of including contributions equaling 15% and 30% of "gross pay" is shown in the following table:

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[6] Appendix B, p. 16a, infra.

[7] Inclusion of the lower percentage as additional "wages" in 1980 would have raised the amount actually paid as compensation to 50,000 - 60,000 claimants by about $20 million. A 30% increment would have generated a much larger increase, about $60 million in that year alone. Unless reversed, the decision will have tremendous annual impact.

Average Wage (Selected Intervals)	Percent of Total Cases	PERCENT OF TAKE-HOME PAY REPLACED BY BENEFITS: COLUMN A* (Mr. Hilyer's "Fringe" Package)	COLUMN B** (Longshore "Fringe Package)
$ 1 - 50	0.38	129%	146%
51 - 100	2.48	127%	143%
101 - 150	11.26	131%	148%
151 - 200	12.02	100%	113%
201 - 250	16.60	95%	108%
251 - 300	18.51	98%	111%
301 - 350	12.40	100%	113%
351 - 400	10.31	102%	116%
401 - 450	4.96	105%	118%
451 - 500	3.24	107%	121%
501 - 550	2.86	110%	125%
551 - 600	1.91	113%	127%
601 - 650	1.34	115%	130%
651 - 700	0.57	117%	133%
701 - 750	0.76	120%	135%
751 - 800	0.38	122%	138%

*Column A - Weekly Benefit equals 66-2/3% of "Wages" including a 15% Pension/Health & Welfare Fund Contribution.

**Column B - Weekly Benefit equals 66-2/3% of "Wages" including a 30% Pension/Health & Welfare Fund Contribution.

The decision below will vastly increase the number of workers who receive more for not working than for labor performed.

For all but a relatively few workers, all economic incentive to resume employment will be erased. In the longshoring industry, the decision below will increase the typical worker's compensation benefits to a level at least 20% to 25% greater than the amounts taken home from a full week of productive work. There can be no justification for such a result.

> Even among those who contend that the scale of benefits is generally too low, there are few if any who would contend that anything resembling tort principles of amount of recovery should be imported into compensation law. It was never intended that compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering.
>
> (1 Larson, Workmen's Compensation Law, § 2.50, pp. 11-12 (1964))

The delivery of compensation benefits exceeding average take-home pay is absurd.

That absurdity is inevitable unless the decision below is reversed.[8]

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[8] The absurdity of the Court's conclusion will strike both workers and employers.

If contributions to pension/health and welfare funds are "wages" within the meaning of 33 U.S.C. § 902(13), then the receipts from those same funds must also be "wages" within the meaning of 33 U.S.C. § 902(10):

> (10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. (Emphasis added.)

The receipt of "wages" should either (a) preclude an award of total disability [and a loss of the annual cost-of-living adjustments provided by 33 U.S.C. § 910(f)], or (b) assure that the employer or its insurer receives a credit for the amounts received from the fund.

Nothing in the history of the 1972 Amendments suggests that labor agreed to a benefit structure which provided employers with a right to offset pension benefits gained through collective bargaining against their statutory compensation liabilities.

III.

THE DECISION BELOW WILL REQUIRE THE RECALCULATION OF BENEFITS PAYABLE IN HUNDREDS OF THOUSANDS OF CASES "CLOSED" SINCE 1972, CAUSING THE COLLAPSE OF THE LHWCA'S ADMINISTRATIVE SYSTEM AND THE IMPOSITION OF A STAGGERING AND UNFORSEEN COST ON EMPLOYERS AND THEIR INSURERS

The amount of "wages" is central to nearly every LHWCA proceeding. Except in those cases involving workers with current annual incomes exceeding $38,000, the appropriate compensation rate is tied directly to the employee's own weekly "wages."

Administrative determinations of accurate "wages" and the calculation of the appropriate benefit rate are handled in accordance with the Department's Longshore Procedure Manual. The Manual

specifically directs the exclusion of pension/health and welfare contributions.[9]

About 96% of all longshore claims are "resolved" by Deputy Commissioners and their claims examiners. Since 1972, the Deputy Commissioners have had no authority to make final determinations of disputed issues. Claims resolved by Deputy Commissioners remain forever open. The amounts of "wages" upon which initial compensation rates are based remain forever subject to redetermination. Intercounty Const. Co. v. Walter, 422 U.S. 1 (1975).

Even those claims in which purportedly final orders have been entered remain subject to the Act's "modification"

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[9] The pertinent portion of the Manual appears as Appendix C to this Brief. Several hundred thousand cases have been informally resolved in accordance with the Manual's instructions.

provisions and eligible for reopening at any time within one year following the date of the last compensation payment in order to permit correction of any "mistake in a determination of fact." 33 U.S.C. § 922.

Modification remedies have been broadly defined by this Court. O'Keefe v. Aerojet General Shipyards, Inc., 404 U.S. 254 (1971); Banks v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459 (1968). The Deputy Commissioner's determination of a compensation rate pursuant to an erroneously restrictive definition of "wages" would certainly qualify as a "mistake." Unless reversed by this Court, the decision below will require the reopening and recalculation of the benefits payable in hundreds of thousands of post-1972 "time-loss" cases.

The Department of Labor simply cannot perform the tasks involved in the massive effort mandated by the decision below. The number of "lost-time" injuries has nearly quadrupled since 1972. The Department's claims processing staff has grown by only 47%--to a total of 147 persons. This staff barely manages its current case load. The administrative staff and structure will collapse under the weight of thousands upon thousands of revived claims.

CONCLUSION--THE NEED FOR IMMEDIATE REVERSAL

The LHWCA must function or fail in a world of reality. Risks must be assessed and shared in advance of their materialization. Goods and services must be priced before the actual final cost can be known.

The evaluation of LHWCA risks and the pricing of the items which must absorb its costs have for more than half a century reflected the consensus that employer contributions to pension/health and welfare funds are outside the "wages" upon which the amount of compensation entitlement is based.

The inclusion of these contributions in the LHWCA's "wage" base will severely wrench an already unsteady compensation structure and create an absurdity--a system in which most workers "net" more off work than on.

The need for prompt action has heightened. Apparently believing itself bound by the Court's opinion below, the Benefits Review Board has reversed itself and ruled pension contributions within the LHWCA's "wages" definition. Minick v. Levin Metals Corp., BRB No. 80-835,

April 28, 1982. The Deputy Commissioners and Administrative Law Judges must follow the Board's lead. The decision below is about to become the "law of the land." Only this Court can prevent the disaster now facing the entire system.

/s/ DENNIS LINDSAY
/s/ ROBERT E. BABCOCK
Suite 700, Columbia Square
111 S.W. Columbia
Portland, Oregon 97201
(503) 226-1191

ATTORNEYS FOR AMICI CURIAE

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 79-7093

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY AND INSURANCE COMPANY OF WAUSAU,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and NANCY A. FREER,
Respondents.

No. 79-7094

NANCY A. FREER,
Petitioner,

v.

DUNCANSON-HARRELSON COMPANY and EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

SUPPLEMENTAL BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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* * *

ARGUMENT

THE EMPLOYER'S CONTRIBUTIONS TO THE PENSION TRUST FUND ARE NOT WAGES WITHIN THE MEANING OF SECTION 2(13) OF THE ACT BECAUSE CONGRESS DID NOT INTEND TO INCLUDE SUCH CONTRIBUTIONS IN WAGES AND BECAUSE THEY DO NOT POSSESS THE CUSTOMARY ATTRIBUTES OF WAGES

* * *

1. The inquiry begins with the language of the statute and is guided by the plain and ordinary meaning of the words Congress used. Richards v. United States, 369 U.S. 1, 9 (1961). In attempting to ascertain the legislative intent underlying a statute passed over 50 years ago, the definition of wages that was prevalent then is more enlightening than a more recent meaning. Cf. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 280 (1980). Even if today wages are understood as "often including . . . amounts paid by the employer for insurance, pension, hospitalization, and other bene-

fits," Webster's Third New International Dictionary 2569 (1961), they were not always thus understood. The Congress that enacted the LHWCA would have had quite a difficult "plain and ordinary meaning" in mind.

Indeed, it would have been surprising if the 1927 Congress had thought about fringe benefits at all. An earlier version of Webster's dictionary defines wages without any reference to fringe benefits whatsoever. See Webster's New International Dictionary 2863 (2d ed. 1957) ("Pay given for labor, usually manual or mechanical, at short intervals, as distinguished from salaries or fees.").[7/]

7/ Webster's second edition was originally published in 1934 and remained unchanged until the third edition was published in 1961. See Webster's Third New International Dictionary, supra, at 6a, 7a.

Therefore, when Congress spoke of wages in 1927, it did not understand that term to include fringe benefits.

2. The legislative history of the 1964 amendment to Section 1 of the Davis-Bacon Act, 40 U.S.C. 276a.(b), which recounts the development of the role of fringe benefits, supports that conclusion. When enacted in 1931, Davis-Bacon did not define wages to include employer trust fund payments and employer fringe benefit costs. In 1964, Congress amended the statute expressly to define wages in those terms. See 40 U.S.C. 276a.(b). The Senate Report accompanying H.R. 6041, the bill that was ultimately enacted, indicates that fringe benefits were not mentioned in 1931 because they "were unknown" at the time. S. Rep. No. 963, 88th Cong., 2d Sess. 1 (1964).

* * *

Thus, the Congress that enacted the LHWCA, 4 years earlier, could not have "intended" that fringe benefits be considered wages. It is only since then that they have evolved to their present status of significance as compensation, and it is for Congress to make it clear, if that is its intent, that wages under LHWCA should now include fringe benefits.

Indeed, the very fact that Congress amended the Davis-Bacon Act to define wages as including fringe benefits suggests that the LHWCA similarly would require new legislation to reflect the more recent trend. This is especially so where employers, in choosing to be self-insurers, and insurance companies, in setting premiums, have ordered their affairs according to the long-standing practice of excluding fringe benefits from wage computations. See J.W. Bateson Co. v. United

States ex rel. Board of Trustees, 434 U.S. 586, 592-593 (1978). Cf. Potomac Electric Power Co. v. Director, OWCP, supra, 449 U.S. at 282 (one of employers' interests under the LHWCA is "having their contingent liabilities identified as precisely as possible."). "In the absence of some clear indication to the contrary [by Congressional action], we should not defeat these reasonable expectations." J.W. Bateson Co. v. United States ex rel. Board of Trustees, supra, 434 U.S. at 593.

* * *

3. Several practical implications of holding that wages include fringe benefits militate against doing so. First, the increase in total compensation payments occasioned by including benefits in wages may be enormous[11/] and must be borne by

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11/ OWCP estimates the increase to range from $40-87 million annually.

employers, either in the form of higher insurance premiums or higher self-insurance costs. It seems highly probable that some employers would be unable to pass on or bear the extra costs and would be forced out of business.

Second, if wages are held to include fringe benfits, then the national average weekly wage, upon which the statutory maximum and minimum are based, should probably include those benefits as well. Even though the national average weekly wage is defined separately from wages, compare 33 U.S.C. 902(19) with 33 U.S.C. 902(13), it is likely that the same meaning was intended. See United States v. Cooper Corp., 312 U.S. 600, 606 (1941) ("The connotation of a term in one portion of an Act may often be clarified by reference to its use in others."). That would have the effect of raising the maximum and

minimum awards under the Act and would impose a difficult administrative burden on BLS, which calculates the weekly wage. When BLS attempted to determine average fringe benefit payments in the past, the delay between payments and determinations was over two years, an impermissibly long period under the Act. 33 U.S.C. 906(b)(3).

Last, the increased awards that result from including benefits in wages could increase the disincentive for non-fatally injured workers who otherwise might wish to return to work. Because compensation awards are not taxable income to the recipient, an injured worker receiving two-thirds of his benefit-enhanced wages could take home more than he would if he were working and paying tax on his

straight wages.[12/] The creation of such a disincentive is not in the public interest. Cf. Potomac Electric Power Co. v. Director, OWCP, supra, 449 U.S. at 290 n.9 (Blackmun, J., dissenting).

* * *

12/ Although this disincentive already exists for any worker whose average tax rate is at least 33-1/3%, the inclusion of fringe benefits in wages places more employees in this situation. For example, consider the disincentive that results from including the fringe benefits provided under the current collective bargaining agreement governing work by members of the International Longshoremen's Association in Atlantic and Gulf Coast ports. That agreement, which is midway through its three year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour worked to be paid into the pension and health and welfare funds. (Locally negotiated fringe benefits and fringe benefits required by law are extra.)

Assuming a 40 hour work week, the longshoreman's wages before taxes are withheld would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66-2/3%) would be $341.33. However, if the employer contributions are discontinued and instead are included in the computation, the base upon

12/ (concluded)

which the compensation rate is applied raises to $695.60 and would yield a weekly compensation rate of $463.63, or nearly 91% of pre-injury gross wages, tax-free. Of course, if the contributions are not discontinued, they should be excluded from wages in order to prevent the employee from receiving a double recovery.

APPENDIX B

REPORT BY THE
COMPTROLLER GENERAL
OF THE UNITED STATES

LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT NEEDS AMENDING

* * *

United States
General Accounting Office
HRD-82-25
April 1, 1982

* * *

COMPENSATION BENEFITS MAY DETER SOME EMPLOYEES FROM RETURNING TO WORK

Ideally, the benefits provided to a disabled worker would (1) allow a worker to maintain a standard of living somewhat comparable to the worker's standard of living before the disabling injury, (2) be less than the amount of the worker's previous income by the amount of work-related expenses, and (3) provide sufficient incentive for the worker to seek rehabilitation and prompt reemployment, where possible.[1/] The National Commission on State Workmen's

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1/ "White Paper on Workers' Compensation," prepared by an interdepartmental group from the Departments of Labor, Commerce, Health and Human Services, and Housing and Urban Development working on workers' compensation, May 1974.

Compensation Laws stated in its 1972 report[2] that the compensation provided to disabled workers must balance incentives to employers to improve safety--thus reducing compensation cost--with incentives to the disabled workers to use rehabilitation services and return to work.

Benefits approach, and may exceed, net earnings

The act provides for total disability compensation benefits, subject to minimums and a maximum, of 66-2/3 percent of gross pay. When this percentage was established, gross pay approximated net pay. However, primarily due to income taxes and social security taxes, the gap between gross and net pay has widened over the years. Thus, tax-free compensation benefits replace a higher percentage of net pay than they did in the past.[3] In addition, some workers are eligible for other benefits which, when combined with compensation, could result in benefits that substantially exceed preinjury net pay.

2/ "The Report of the National Commission on State Workmen's Compensation Laws," July 1972.

3/ Our report "Federal Employees' Compensation Act: Benefit Adjustments Needed to Encourage Reemployment and Reduce Costs" (HRD-81-19, Mar. 9, 1981) discusses a similar issue. Some of the data discussed in this section are taken from that report.

A March 1980 Labor survey of 550 closed cases (see p. 16) showed that compensation paid under the act, on the average, equaled 88 percent of preinjury take-home pay. The percentage of take-home pay replaced generally was higher at higher income levels.[4/] For example, a worker earning $272.70 a week received compensation equal to 85 percent of take-home pay, while a worker earning $524.40 a week received compensation equal to 96 percent of take-home pay.

If there were additional family income that would put a worker in a higher tax bracket, such as from a working spouse, taxfree compensation would replace a higher percentage of the employee's income. Also, such work-related expenses as commuting and child-care costs, which have increased over the years as people have tended to live farther from work and multiple-wage earner and single parent households have become more common, could be reduced.

In all States except two, workers who are temporarily or totally disabled generally received benefits equal to at least two-thirds of their predisability wages. Dr. Peter Barth, an expert in workers' compensation, has stated that nothing indicates that two-thirds of wages is high

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4/ Workers with very low earnings received compensation that exceeded take-home pay because their tax-free compensation is 100 percent of their average weekly wage.

enough to be adequate and simultaneously low enough to offer workers some inducement to return to work as promptly as medically possible and that the same statement applies to any other wage percentage. He believes the two-thirds figure is used only because it is widely accepted and, in turn, widely recommended.

Evidence from private, long-term disability insurance programs indicates that high compensation rates cause disability incidence rates to increase. Private insurance plans with compensation rates over 70 percent of predisability gross income have incidence rates two-thirds above the average, while plans with compensation of 50 percent or less have incident rates one-third below the average. Because of this, private insurers generally attempt to limit disability benefits to 50 to 60 percent of gross earnings.

For some workers, benefits in addition to compensation could further increase income. A worker covered by the International Longshoremen's Association guaranteed annual income program would earn a minimum of $464 a week during the first year of its 1980 contract. A worker who was injured and unable to work, assuming earnings of $464 a week, would receive compensation under the act equal to two-thirds of that amount, or $309 per week tax free. In addition, the Association would supplement this compensation up to the guaranteed amount during the first year of injury. If the worker had a family of four, this supplement would amount to $155 gross or $141 net a week for a total of $450 per week. The worker's normal take-home pay would be $364 a week

after deductions for Social Security and Federal income taxes. Thus, the worker would receive $86 more a week than when working.

Employees who have been members of the International Longsoremen's and Warehousemen's Union for 13 or more years who become totally and permanently disabled are entitled to a disability pension regardless of the cause of disability. Such employees may receive both a disability pension and compensation benefits, after a 26-week offset period.

Additional benefits are also available under the Social Security Disability Insurance Program. If injured employees meet eligibility requirements, compensation can be supplemented up to 80 percent of gross wages after 6 months of disability.

It should be noted, however, that additional benefits would be available only in a limited number of cases. Of the 200 cases in our sample, only 4 percent involved disabilities that lasted longer than 6 months. Also, most workers covered by the act are not members of the unions and/or are not eligible for the union benefits described above.

The Labor study compared the percentage of predisability take-home pay that would be replaced at four different benefit levels with the percentage being replaced under the current method of compensation for 550 closed compensation cases.

Based on Labor's study, setting the compensation rate at a percentage of spend-

able income would appear to be more equitable, because the spendable income approach provides income replacement that remains fairly constant at varying income levels. The taxable income methods and the existing method provide higher replacement percentages as gross income increases until the maximum compensation rate is reached.

It is difficult, if not impossible, to state at what income replacement level employees will be most inclined to return to work only when his or her full wages are replaced. Even without accounting for savings from such work-related expenses as transportation and child care, some employees will prefer to remain away from employment for less than 100 percent of their net wages, especially in multiple-income households. Other employees will return to work as soon as physically possible, regardless of the economic disincentive to do so.

Based on Labor's study, the current level of benefits provides compensation that comes closer to full replacement of net earnings than to the 66-2/3-percent replacement anticipated when the act was passed. In addition to minimizing incentives to return to work, compensation that approaches take-home pay gives little recognition to a basic concept of workers' compensation that there should be some sharing of risk between employer and employee for work-related illness or injury.

Longshore Act: Average Weekly Benefit Received Under Current Method and Alternative Methods, Expressed As a Percentage of Take-Home Pay for Selected Wage Intervals of Employees with 2.5 Federal Exemptions in States With Graduated Income Taxes, Closed Cases

Weekly predisability gross pay, selected intervals	Percent of total cases	Average weekly predisability gross pay	Average weekly predisability take-home pay (note a)	Percent of average weekly predisability take-home pay replaced: Current method (66-2/3 percent)	80 percent of gross subject to Federal/State income tax	75 percent of gross subject to Federal/State income tax	85 percent of spendable income (note b)	80 percent of spendable income (note b)
$1 to $50	0.38	$ 27.00	$ 24.00	c/109	c/109	c/109	c/109	c/109
$51 to $100	2.48	82.62	75.31	c/110	c/110	c/110	c/110	c/110
$101 to $150	11.26	125.09	109.25	c/98	c/98	c/98	c/98	c/98
$151 to $200	12.02	171.60	142.95	81	91	86	88	82
$201 to $250	16.60	223.61	180.77	83	91	86	88	82
$251 to $300	18.51	272.70	214.98	85	91	85	88	83
$301 to $350	12.40	322.23	248.92	87	91	86	88	83
$351 to $400	10.31	372.96	282.47	89	91	86	88	83
$401 to $450	4.96	419.12	309.98	91	92	87	88	83
$451 to $500	3.24	473.35	348.23	93	94	89	88	83
$501 to $550	2.86	524.40	367.08	96	94	88	88	83
$551 to $600	1.91	581.00	397.10	98	94	90	88	83
$601 to $650	1.34	622.71	417.77	100	95	90	88	83
$651 to $700	0.57	677.33	443.31	d/97	95	91	88	83
$701 to $750	0.76	726.00	466.07	d/92	d/92	91	88	83
$751 to $800	0.38	788.50	495.31	d/87	d/87	d/87	d/87	83
Average all cases	-	285.95	239.26	88	93	88	90	85

a/Take-home pay equals gross pay minus Federal and State income taxes, social security (FICA) taxes, and estimated deductions for maritime union dues.

b/Spendable income equals gross pay minus Federal and State income taxes and social security (FICA) taxes.

c/Benefit amount is $106.56 (or the employee's actual wage if less than $106.56), which is 50 percent of the applicable national average weekly wage, the minimum payment established by the Longshore Act.

d/Benefit amount is $426.26, which is 200 percent of the applicable national average weekly wage, the maximum payment established by the Longshore Act.

APPENDIX C

Longshore (LHWCA) Procedure Manual
Part 1, Claims

Chapter 1-700
Determination of Average Weekly Wage

October 15, 1976

1-703. Annual Earnings. The average weekly wage is set at one fifty-second part of the employee's average annual earnings so computed. Any one or combination of the following are included in the term wages:

1) Cash wages and salary

2) Anything of value received as consideration for the work

A) Tips and bonuses

B) Room and Board

C) Car allowance (if it exceeds actual travel expense)

(contributions by the employer to pension and health plans are not included as wages. Refer to LS/HW Program Memorandum No. 32, dated June 17, 1968)

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of May, 1982, three copies of this Brief were mailed, with first-class postage prepaid, to the following:

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue N.W.
Washington, D.C. 20006

ARTHUR LARSON
Duke University School of Law
Durham, NC 27706

RICHARD W. GALIHER, JR.
GALIHER, CLARKE, MARTELL
& DONNELLY
1215 - 19th Street N.W.
Washington, D.C. 20036

COUNSEL FOR PETITIONERS

GEORGE S. LEONARD
6207 Tally Ho Lane
Alexandria, VA 22307

COUNSEL FOR RESPONDENT HILYER

THE HON. REX K. LEE
SOLICITOR GENERAL, JUSTICE DEPARTMENT
Constitution Avenue, Between 9th & 10th
Washington, D.C. 20530

DONALD S. SHIRE
ASSOCIATE SOLICITOR, EMPLOYEE BENEFITS
U. S. DEPARTMENT OF LABOR
Suite N-2620, NDOL
Washington, D.C. 20210

COUNSEL FOR DIRECTOR, OWCP, RESPONDENT

_____
Dennis Lindsay
Counsel for Amici Curiae

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